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17
18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF NEVADA**

20 UNION PACIFIC RAILROAD COMPANY,
21 a Delaware Corporation,

22 Plaintiff,

23 vs.

24 WINECUP GAMBLE, INC., a Nevada
25 Corporation; and PAUL FIREMAN, an
26 individual,

27 Defendants.
28

✓ FILED
ENTERED
RECEIVED
SERVED ON
COUNSEL/PARTIES OF RECORD
NOV 17 2017
CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: _____ DEPUTY

CASE NO. 3:17-cv-00477-LRH-VPC

STIPULATION AND ~~(PROPOSED)~~ ORDER
ALLOWING PLAINTIFF TO FILE FIRST
AMENDED COMPLAINT

COME NOW Plaintiff Union Pacific Railroad Company ("Union Pacific"), Defendant
Winecup Gamble, Inc., and Defendant Paul Fireman and stipulate pursuant to Fed. R. Civ. P. 15
(a)(2) that Union Pacific should be granted leave to file its First Amended Complaint, a copy of
which is attached as Exhibit "A." Union Pacific seeks to file its First Amended Complaint to add

additional allegations related to the failure of the Dake Reservoir Dam. It is hereby stipulated, by and between Union Pacific and Defendants, by and through their respective counsel, that:

1. Union Pacific should be granted leave to file its First Amended Complaint, a copy of which is attached as Exhibit "A."

2. Both Defendant Winecup Gamble, Inc.'s and Defendant Paul Fireman's responsive pleading shall be due December 8, 2017.

STIPULATED AND AGREED to on this 16th day of November, 2017

Respectfully submitted,	Respectfully submitted
LAMSON, DUGAN & MURRAY, LLP	SNELL & WILMER, L.L.P
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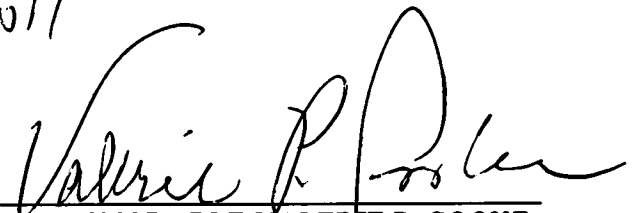
ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above stipulation governing is Granted and IT IS HEREBY ORDERED:

1. Union Pacific is granted leave to file its First Amended Complaint, a copy of which is attached as Exhibit "A."

2. Both Defendant Winecup Gamble, Inc.'s and Defendant Paul Fireman's responsive pleading shall be due December 8, 2017.

Dated: November 17, 2017


THE HONORABLE VALERIE P. COOKE,
U.S. MAGISTRATE JUDGE

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Company, a Delaware Corporation
Application for Pro Hoc Vice to be Submitted*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNION PACIFIC RAILROAD COMPANY,
A Delaware Corporation,

Plaintiff,

v.

~~WINECUP RANCH, LLC, an Idaho Limited
Liability Company; and WINECUP
GAMBLE, INC., a Nevada Corporation; and
PAUL FIREMAN, an individual,~~

Defendants.

CASE NO.

PROPOSED FIRST AMENDED
COMPLAINT

JURY TRIAL DEMAND

FIRST AMENDED COMPLAINT

Plaintiff, UNION PACIFIC RAILROAD COMPANY ("Union Pacific"), for its cause of
action against Defendants, and each of them individually, states and alleges as follows:

PARTIES

1. Union Pacific is a corporation organized and existing under the laws of the State
of Delaware with its principal place of business located in Omaha, Nebraska. It is in the

business of providing interstate freight transportation by rail in 23 states in the western two-thirds of the United States. As part of its interstate business Union Pacific hauls freight on its mainline tracks, providing a critical link in the global supply chain. A portion of these tracks run in an east/west manner from the State of Utah, across the Utah/Nevada State line, and through Elko County, Nevada near the property of the Defendants.

~~2. Defendant WINECUP RANCH, LLC (the "Ranch") is registered in Nevada as a foreign limited liability company. In Nevada government records, the Ranch states that its officers reside in Oakley, Idaho, which upon information and belief is the Limited Liability Company's principal location.~~

~~3. Upon information and belief and at all times herein the Ranch has maintained and operated the Twenty Three Mile Dam ("Dam"), which is the subject of this Complaint, in cooperation with the other Defendants and/or as a joint venture. The Dam is described with more particularity in paragraph 6 herein. The Dam is located in Elko County, Nevada, on property which is at, near, or contiguous to the Railroad's tracks.~~

42. Defendant WINECUP GAMBLE, INC (the "Corporation") is a Nevada corporation organized and existing under the laws of the State of Nevada with its principal place of business located in Elko, Nevada. Upon further information and belief and at all times herein the Corporation is the owner of the Dam-dams in question and the property whereupon it both dams are located. The Corporation has also maintained and operated the Dam-dams under the authority of and/or in cooperation with the other Defendants and/or as a joint venture.

3. Upon information and belief and at all times herein the Corporation has maintained and operated the Twenty-Three Mile Dam, which is the subject of this Complaint, in cooperation with the other Defendant and/or as a joint venture. The Twenty-Three Mile Dam is described with more particularity in paragraph 6 herein. The Twenty-Three Mile Dam is located in Elko County, Nevada, on property which is at, near, or contiguous to the Railroad's tracks.

4. Upon information and belief and at all times herein the Corporation has owned, maintained, and operated the Dake Reservoir Dam, which is the subject of this Complaint, in cooperation with the other Defendant and/or as a joint venture. The Dake Reservoir Dam is

1 described with more particularity in paragraph 7 herein. The Dake Reservoir Dam is located in
2 Elko County, Nevada, on property, which is at, near, or contiguous to the Railroad's tracks.

3 5. Defendant PAUL FIREMAN ("Fireman") is the principle owner and President of
4 the Corporation, which is closely held and has only two shareholders: Fireman and his wife.
5 Upon information and ~~belief~~belief, Fireman is a resident of the State of Florida. Upon further
6 information and ~~belief~~belief, Fireman was in sole control of the Corporation and acted as the
7 outright owner of the real and personal property of the Winecup Gamble ranch. Upon further
8 information and ~~belief~~belief, the Corporation was the alter ego of Fireman, with little to no
9 separate identity between the corporate entity and Fireman; and he did not create the Corporation
10 for legitimate business purposes but rather to derive certain additional personal benefits. Upon
11 further information and ~~belief~~belief, Fireman exercised complete control of the Corporation and
12 failed to authorize adequate expenditures to operate, repair and maintain the ~~Dam~~dams; and
13 Fireman chose not to properly capitalize the Corporation to cover losses from any ~~Dam~~-dam
14 failure, which is detrimental to the Corporation's creditors.

15 6. The Twenty Three Mile Dam (a/k/a ~~Twenty Three Mile Dam~~, the Twenty one
16 Mile Dam or 21 Mile Dam) is identified by ID # NV00110 and the legal ~~description~~
17 ~~of~~description of 189CN42 E67 15BA. It is located on Thousand Springs Creek on the property
18 owned and managed by ~~the Ranch and the~~ Corporation in Elko County, Nevada.

19 7. The Dake Reservoir Dam is identified by ID # NV00109 and the legal description
20 of 189DN40 E70 07D. It is located on Thousand Springs Creek on the property owned and
21 managed by the Corporation in Elko County, Nevada.

22 JURISDICTION AND VENUE

23 ~~7~~8. Paragraphs 1 through ~~6~~-7 of this Complaint are incorporated as though fully set
24 forth herein.

25 ~~8~~9. This Court has original subject matter jurisdiction over this case because the
26 parties have diverse citizenships and the amount in controversy exceeds Seventy-Five Thousand
27 Dollars (\$75,000.00). 28 U.S.C. § 1332.

28 ~~9~~10. This Court has personal jurisdiction over the Defendants in this case because ~~the~~

~~Dam~~~~both dams are~~ is located in Nevada, and each of the Defendants' acts or omissions alleged herein occurred in the State of Nevada. In addition, the Defendants have directed their activities and consummated transactions relating to their property and the Dams within this jurisdiction, and the injury suffered because of Defendants' negligence occurred in this State.

~~40~~11. Under 28 U.S.C. § 1391 venue is proper in this judicial district because the property which is the subject of this action is located in Nevada and a substantial part of the events or omissions giving rise to the claim occurred in this State.

FACTS

~~41~~12. Paragraphs 1 through ~~40~~11 of this Complaint are incorporated as though fully set forth herein.

~~42~~13. The Twenty Three Mile Dam is an earthen ~~embankment~~~~which~~embankment, which is approximately 600 feet in length. It is approximately 60 feet tall with a top width of around 20 feet, and a reservoir of approximately 300 acres. The flows from the reservoir are controlled through an outlet discharge tunnel which is a 3 feet wide concrete pipe with a flow capacity of 250 cubic feet per second. An emergency spillway is located on the Twenty Three Mile Dam~~Dam~~'s north end, about nine feet below the crest of the Twenty Three Mile Dam~~Dam~~.

~~43~~14. Prior to February 8, 2017, uncontrolled seepage from the foundation of the Twenty Three Mile Dam had been evident for many years on the opposite side of the embankment. Previous inspection reports dated as early as 1996 from the State of Nevada Division of Water Resources warned the Defendants of structural safety problems with the Dam's earthen embankment and outlet tunnel. In repeated State inspections the outlet tunnel was found to be full of debris and silt, which prevented the release of water from the reservoir and created hydraulic pressure on the Twenty Three Mile Dam's foundation. The valves and operating works were also found to be inoperable at the time of inspections. There was seepage from the foundation of the Twenty Three Mile Dam that indicated structural integrity issues.

~~44~~15. The State recommended as early as 1996 that for the Twenty Three Mile Dam the Defendants clear the tunnel and operate the outlet through its full range of motion at least twice

1 annually to make certain that it could and would operate as intended to relieve any pressure on
2 the earthen embankment during peak watershed flow. In 2002, the State of Nevada informed
3 Defendants in a report that the outlet and spillway at the Twenty Three Mile Dam could not
4 convey flood peaks of the 10 year magnitude. Defendants were put on written notice that the
5 Twenty Three Mile Dam's current condition could not withstand more than a 10 year flood
6 event.

7 ~~45~~16. On September 19, 2003 the State sent a letter to Defendants requesting that within
8 the next 3 years the Defendants "undertake a program for investigation of the hydraulic adequacy
9 of the Dam with respect to flooding (so-called 100 year event) and seeping under a full hydraulic
10 head (reservoir full)." The Defendants never prepared or submitted an investigation to the State
11 as requested. Defendants did not repair or remediate the Twenty Three Mile Dam to
12 accommodate a full reservoir or a 100 year event as required by the State of Nevada.

13 ~~46~~17. On May 21, 2012, a subsequent State inspection report on the Twenty Three Mile
14 Dam noted that vegetation and debris surrounding the outlet channel were still present. The
15 report recommended that it be removed, and that all vegetation on the face of the Twenty Three
16 Mile Dam should be removed as it emerges on a continuing basis. The report noted again that
17 the Dam was seeping from below and wearing away a section of the Twenty Three Mile Dam's
18 foundation at the center of the toe. The 2012 State inspection found "major seepage...apparently
19 from underneath the main structure" of the Twenty Three Mile Dam. The State again suggested
20 that Defendants perform regular maintenance of the Twenty Three Mile Dam to make certain
21 that its parts were operating. The 2012 State inspector ~~noted that~~ noted, "no one has been here in
22 years," little had changed, and no improvements had been made in the intervening 10 years. The
23 State Inspector recommended in his April 17, 2012 inspection report that the Defendants attend
24 to the "major" seepage at the base of the Twenty Three Mile Dam which was coming from
25 underneath the main embankment structure. The State provided these reports to Defendants.

26 ~~47~~18. A subsequent inspection by the Nevada Division of Water Resources on July 27,
27 2016 found that the Twenty Three Mile Dam outlet tunnel was again obstructed by visible
28 debris, vegetation and soil erosion. The outlet controls did not appear to be working. The

1 inspection also found that deep rooted vegetation had been growing on the Twenty Three Mile
2 Dam, posing a structural problem. The inspection report sent to the Defendants dated September
3 6, 2016 directed that within one year the outlet tunnel should be (again) cleared to prevent
4 backwater conditions, vegetation should be removed to prevent damage to the earthen
5 embankment and burrowing from animals, and the seepage ponds should be monitored.

6 19. At all times and pursuant to Nevada Administrative Code Section 535.240, the
7 Twenty Three Mile Dam was required, at minimum, to be able to withstand 100 year flood event
8 and to maintain its integrity during such an event. The State of Nevada warned Defendants in
9 2002 and 2003 that the structural integrity of the Twenty Three Mile Dam could not support
10 more than a 10 year flood event.

11 20. The Dake Reservoir Dam is an earthen embankment located downstream from the
12 Twenty Three Mile Dam in the same watershed area of the Thousand Springs Creek as the
13 Twenty Three Mile Dam.

14 21. On September 23, 2013, a State inspection report on the Dake Reservoir Dam
15 noted that the dam was listed as a significant hazard dam with respect to downstream conditions.
16 The overall condition of the dam was listed as "poor" due to the inability to regulate the
17 reservoir. The State provided this report to the Defendants.

18 22. On September 6, 2016, a State inspection report on the Dake Reservoir Dam
19 noted that the dam was still listed as a significant hazard with respect to downstream conditions.
20 The condition of the dam was poor do to the inability to regulate the reservoir. The outlet
21 controls were inoperable. The report noted that additional precautions should be taken until the
22 dam is properly breached and decommissioned. These included removing vegetation from the
23 embankment in order to look for seepage, stability concerns, and other dam safety issues. The
24 report recommended a rodent abatement program and stated that dips, low spots, rutting and
25 erosion gullies on the dam crest must be filled in with the proper materials.

26 23. On or about February 8, 2017, the Twenty Three Mile Dam failed. In the
27 daysdays preceding the failure, precipitation and snowmelt occurred in the watershed, adding
28 water to the Dam's reservoir. Records show that the precipitation did not amount to a 100 year

flood event. The water in the Dam did not overtop the embankment at any time, and the failure occurred before the water level in the reservoir reached the level of the emergency spillway.

~~19~~²⁴. On or before February 8, 2017, the Twenty Three Mile Dam's outlet tunnel was in the closed position. Because of this, excess water was unable to flow out of the reservoir. The added precipitation in the reservoir created undue hydraulic pressures on the Twenty Three Mile Dam's earthen foundation. The failure occurred at the base of the Twenty Three Mile Dam when a portion of the embankment gave way due to hydraulic pressure.

~~20~~²⁵. As a result of the failure, a massive amount of water flowed down from the Twenty Three Mile Dam's reservoir and disgorged its contents downstream.

26. The water from the Twenty Three Mile Dam failure flowed, in part, to the Dake Reservoir Dam. On or about February 9, 2017, the Dake Reservoir Dam failed and the earthen embankment was breached. Upon information and belief, the failure of the Twenty Three Mile Dam caused or contributed to the failure of the Dake Reservoir Dam.

27. ~~This~~ The collective failures of the Twenty Three Mile Dam and the Dake Reservoir Dam (collectively the "Dams") failure and caused a release of water caused that led to catastrophic flooding. The water washed out a large portion of Union Pacific's railroad tracks and damaged Union Pacific property located downstream in Elko County. It removed the Railroad's right-of-way, track bank and slope, and the physical infrastructure which infrastructure, which supported the tracks. The water was so swift and powerful that it washed away the earth that elevated the tracks, leaving the tracks suspended in the air as if a bridge existed at one time underneath. Freight train passage was impossible for a lengthy period of time due to the washout. Union Pacific was unable to move its freight from Utah to points west, north and south in Nevada and to timely service its customers. The flood from the the Dams' reservoirs altered the land's topography and watershed runoff, requiring the Railroad to add additional infrastructure to its rights of way in order to adequately support its tracks and to prevent additional surface water damage.

~~21. At all times and pursuant to Nevada Administrative Code Section 535.240, the Dam was required, at minimum, to be able to withstand 100-year flood event and to maintain its~~

1 ~~integrity during such an event. The State of Nevada warned Defendants in 2002 and 2003 that~~
2 ~~the structural integrity of the Dam could not support more than a 10 year flood event.~~

3 **COUNT I – NEGLIGENCE**

4
5 2228. Paragraphs 1 through 21-27 of this Complaint are incorporated as though fully set
6 forth herein.

7 2329. At all times material to this action, Defendants, and each of them, had a duty to
8 maintain, repair, and operate the Dams~~Dam~~ in a safe condition in accordance with statutory
9 mandates and common law. This includes the duty to maintain, repair, and operate the
10 Dams~~Dam~~ in a safe manner to avoid damages and flooding to the property of Union Pacific, its
11 rights of way, and its tracks.

12 2430. Defendants, and each of them, breached their duties in one or more of the
13 following ways:

- 14 a) ___ Failing to have an adequate dam ~~Dam~~-safety program and practices in
15 place to prevent a failure of the Dams;
- 16 b) Failing to inspect the Dams ~~Dam~~ and to determine whether the Dams and
17 all of its ~~each~~ Dams' parts were capable of operating as intended at all times;
- 18 c) Failing to test the Dams' ~~Dam~~-parts to determine whether they are capable
19 of operating as intended at all times;
- 20 d) Failing to take action prior to the precipitation event to clear the stress
21 relief outlet pipes of debris;
- 22 e) Failing to take action prior to the precipitation event to open the stress
23 relief outlet pipes;
- 24 f) Failing to monitor the Dams~~Dam~~ after precipitation occurred in the
25 watershed, and just prior to the failures, in order to determine whether the
26 structural integrity of the Dams was~~ere~~ sufficient ~~during the precipitation to~~
27 prevent a failure;
- 28 g) Failing to operate and open the stress relief outlet pipes after precipitation

1 began in the watershed and just prior to the failures;

2 h) Failing to repair the Dams' Dam structure and ~~its~~ their parts in order to
3 prevent foundational seepage prior to February 8, 2017 and February 9, 2017;

4 i) Failing to remove vegetation on the Dams which affected its integrity
5 prior to February 8, 2017 and February 9, 2017;

6 j) Failing to follow the safety recommendations of the Nevada Dam
7 inspectors prior to February 8, 2017 and February 9, 2017;

8 k) Failing to maintain the Dams Dam to prevent a failure;

9 l) Failing to repair the Dams Dam to prevent a failure;

10 m) Failing to operate the Dams Dam to prevent a failure; and/or

11 n) Additional acts or ~~omissions which~~ omissions, which shall become known
12 in the future during the course of discovery.

13 ~~2531~~. Defendants knew or reasonably should have known that its negligent acts and
14 omissions could foreseeably result in the Dams failing because the State of Nevada had warned
15 the Defendants of the each Dam's Dam's safety deficiencies, its defects, and the potential for
16 structural instability in multiple letters and reports prior to February 8, 2017 and February 9,
17 2017 February 8, 2017. Had the Defendants implemented a reasonably adequate safety,
18 inspection, repair and/or maintenance program prior to February 8, 2017 and February 9,
19 2017 February 8, 2017, Defendants would have known, or reasonably should have known, of any
20 such Dams' Dam defects and the potential for structural instability in a timely manner in order to
21 make corrections prior to February 8, 2017 and February 9, 2017. ~~February 8, 2017~~.

22 ~~2632~~. As a result of Defendants' negligence, Defendants caused or contributed to cause
23 the Dams' Dam failures and the release of water from the reservoirs on or about February 8, 2017
24 and February 9, 2017.

25 ~~2733~~. As a direct and proximate result of the Dams' Dam failures, Union Pacific
26 sustained actual and consequential damages in excess of Seventeen Million Dollars
27 (\$17,000,000.00).

28 **COUNT II: NEGLIGENCE PER SE**

2834. Paragraphs 1 through ~~3327~~ of this Complaint are incorporated as though fully set forth herein.

2935. Nevada Statutes and Administrative Code sections mandated that Defendants obey the following State standards:

a) Operate and maintain the Dams and works appurtenant to the Dams in a safe manner and in accordance with all applicable permits, laws and regulations {and} take all necessary action allowed by law to prevent the failure of the Dams (Nev. Admin. Code § 535.370);

b) Perform at their expense any other work necessary for maintenance and ~~operation~~ operation, which will safeguard life and property (Nev. Admin. Code § 535.370);

c) Construct, operate and maintain the Dams with a drainage capacity sufficient to pass, without overtopping, an amount of water equal to the storm runoff generated by a storm whose annual chance of exceedance is 1 percent (Nev. Admin. Code § 535.040 and § 535.240); and/or

d) Union Pacific may rely on additional statutes and administrative codes that may become known in the future during the course of discovery.

3036. These statutes and codes are legislatively imposed standards of conduct obligating Defendants to act in accordance thereto.

3137. The purpose of Nevada's statutes and codes on the construction, maintenance, and operation of dams in Nevada is to protect the health, safety, and welfare of the life and property of the Dam's downstream neighbors.

3238. Union Pacific, with track, trains, and employees located downstream from the Dams, is part of the class of persons / entities that the Nevada legislature intended to protect with its regulations.

3339. Defendants violated these statutes and codes in one or more of the ways set forth in paragraphs ~~24 and 291~~ through 33.

1 ~~40~~34. As a direct and proximate result of Defendants' failure to adhere to these statutes
2 and codes, Defendants caused or contributed to cause the Dams to fail and caused the release of
3 water from the reservoirs on or about February 8, 2017 and February 9, 2017.

4 ~~35~~41. As a further result of Defendants' failure to adhere to these statutes and codes,
5 Union Pacific sustained actual and consequential damages in excess of Seventeen Million
6 Dollars (\$17,000,000.00).

7 **DEMAND FOR PUNITIVE DAMAGES**

8 ~~36~~42. Paragraphs 1 through ~~35~~41 of this Complaint are incorporated as though fully set
9 forth herein.

10 ~~37~~43. Defendants' behavior, both individually and collectively, demonstrated
11 indifference and a reckless disregard to the health, safety, and welfare of the Dam's downstream
12 neighbors. Despite repeated warnings from the State of Nevada and the foreseeable and obvious
13 consequences that would occur because of their recklessness, as alleged in paragraphs 12 through
14 ~~20~~41, Defendants chose to ignore its common law and regulatory obligations in favor of their
15 own financial well-being with reckless indifference to the rights and interests of Union Pacific.

16 ~~38~~44. Defendants' failures were not isolated to a single instance, but instead, were
17 repeated since 1996. Despite numerous and repeated warnings, Defendants' acted in a way that
18 not only threatened extensive property damage but threatened the safety of the citizens of
19 Nevada and Union Pacific employees, all of whom were located downstream from the Dams.

20 ~~39~~45. Defendants engaged in inexcusable conduct that subjected Union Pacific to
21 unjust hardship because of the Defendants' failure to properly maintain and operate the Dams.

22 ~~40~~46. Union Pacific is entitled to the maximum award of punitive damages allowed by
23 law.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Union Pacific hereby prays for a judgment in its favor and against
26 Defendants and each of them on one or both of the causes of action set forth in the Complaint;
27 and for an award of damages totaling in excess of Seventeen Million Dollars (\$17,000,000.00);
28 consequential damages; punitive damages; pre-judgment and post-judgment interest; the costs

1 and fees incurred in prosecuting this action; and such other reasonable sums as this Court deems
2 just and equitable.

3 **DEMAND FOR JURY TRIAL**

4 Plaintiff demands a trial by jury on all issues so triable.

5 DATED this 10th day of ~~August~~October~~November~~, 2017.

6 Respectfully submitted,

7 ~~FENNEMORE CRAIG, P.C.~~LAMSON, DUGAN
8 & MURRAY, LLP

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—Company, a Delaware Corporation
~~Application for Pro Hoc Vice to be Submitted~~*

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CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b) and Electronic Filing Procedure IV(B), I certify that on ~~August~~
~~10, 2017~~ _____, a true and correct copy of the **PROPOSED FIRST AMENDED**
COMPLAINT AND JURY TRIAL DEMAND, was transmitted electronically through the
Court's e-filing electronic notice system to the attorney(s) associated with this case. If electronic
notice is not indicated through the court's e-filing system, then a true and correct paper copy of
the foregoing document was delivered via U.S. Mail.

/s/ Nancy Kay Long

An Employee of Fennemore Craig, P.C.

NLONG/13110008.5/008013-0499657366

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